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BOOK REVIEW

CONCEPTUAL LIMITATIONS ON LONG-ARM JURISDICTION

*Daniel J. Capra**

Jurisdiction in Civil Actions: Territorial Basis and Process Limitations on Jurisdiction of State and Federal Courts. Robert C. Casad. Boston: Warren, Gorham & Lamont, Inc. 1983. Pp. xxi, 793. \$65.00.

Professor Casad's book is the first comprehensive treatment of the problems that can arise in obtaining personal jurisdiction over a defendant in the forum of a plaintiff's choice. Based on his painstaking and exhaustive survey of over 3,900 state and federal long-arm cases, Professor Casad attempts to predict the probable results of such cases in a wide variety of factual situations. Casad also analyzes, among other things, constitutional limitations on state court jurisdiction, problems of personal jurisdiction in federal courts, service of process, and methods of challenging personal jurisdiction.

A book this comprehensive is not adequately reviewed by a seriatim discussion of the various subjects it covers. Each chapter provides a wealth of information and exposition on the difficult issues that often arise in efforts to obtain personal jurisdiction over a non-resident defendant. Casad's book undoubtedly will be useful for practitioners and students in every state for solving any jurisdictional problem that may arise. In the detailed chapters on long-arm jurisdiction, for example, Professor Casad provides not only probable results in general, but also copious footnotes delineating the results reached by every court on the facts discussed in text.

Beyond its use as an instructional and research tool, the book promotes serious thought on the formalistic nature of the law governing forum allocation in the United States. This formalism—under which any rational and comprehensive treatment must suffer—is largely caused by two conceptual demons that should have been discarded long ago: (1) respect for the supposed sovereignty interests of the state of a non-resident defendant, and the corresponding limitations on the forum state; and (2) reliance on physical contacts and physical presence of a defendant within the forum. Professor Casad emphasizes that conceptual concerns with sovereignty limitations or with physical presence serve no useful purpose in a modern, efficient system of forum allocation. Nonetheless, throughout the book the catalogued

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results illustrate the continuing importance of these principles imported into our jurisdictional thought so long ago in *Pennoyer v. Neff*.¹ Because of these limiting principles, the courts, led by the Supreme Court, have failed to focus on the practical, real-life factors that should control any assertion of personal jurisdiction: the convenience of the litigants, and the interest, if any, of the forum state in hearing the litigation. This failure has led to decisions that have little to do with modern commercial reality or fairness among litigants.²

The continuing influence of presence and sovereignty limitations has led to uncertainty, impracticality, and unfairness. This book, on balance, indicates that the courts have not arrived at any principled particularization of results except in the clearest cases. The fact that a lack of predictability exists after 3,900 cases does not tarnish Professor Casad's effort, which brings as much order as possible to a chaotic situation. Responsibility for the unpredictable state of affairs rests with the Supreme Court, which still relies on ancient formalisms that confuse the lower courts and prevent them from reaching reasonable results.

Of course, even if the Supreme Court could give clear constitutional guidelines for determining the permissible scope of personal jurisdiction, there would still be unpredictability of result in a fifty-state system with different statutory bases of jurisdiction. As pointed out by Professor Casad,³ states have construed similar long-arm provisions in contrary fashions.⁴ Moreover, some long-arm statutes cover a broader range of in-state contacts than others.⁵

While fully uniform results are unlikely, more consistency is possible with clear constitutional guidance from the Supreme Court. Guidance for its own sake, however, will not promote consistency. The principles effectuated must be based upon the convenience of both parties, not just the defendant, and the interests of the forum state, not the sovereignty of the defendant's state. As long as Supreme Court

1. 95 U.S. 714 (1877).

2. See, e.g., *Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Hanson v. Denckla*, 357 U.S. 235 (1958).

3. R. Casad, *Jurisdiction in Civil Actions*, ¶ 4.01[1][b], at 4-5 to -6 (1983).

4. Compare *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 438, 444, 176 N.E.2d 761, 764, 767 (1961) (statute providing jurisdiction over tortious act committed in the state applies to out-of-state act with in-state effect) with *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.* (*Feathers v. McLucas*), 15 N.Y.2d 443, 463, 209 N.E.2d 68, 79, 261 N.Y.S.2d 8, 23 (similar statutory language; contrary result reached because Illinois court's interpretation in *Gray* "exceeds the bounds of sound statutory construction"), *cert. denied*, 382 U.S. 905 (1965).

5. Compare Cal. Civ. Proc. Code § 410.10 (West 1973) (jurisdiction co-extensive with constitutional principles) with N.Y. Civ. Prac. Law § 302 (McKinney 1972 & Supp. 1983-84) (enumerated-acts long-arm not as extensive as constitution allows).

"guidance" is grounded in *Pennoyer*-type formalistic theory, even if it is unambiguous, lower courts will remain either confused or rebellious.⁶

This Book Review presents some thoughts on the Supreme Court's treatment of personal jurisdiction as a formalistic legal principle, and the fallout of such inhibited treatment on the lower courts. Consideration is also given to the Court's most recent flirtations with the concepts of sovereignty and physical presence in *Keeton v. Hustler Magazine, Inc.*⁷ and *Calder v. Jones*.⁸ With the inspiration of Professor Casad's thorough and thoughtful work, an attempt should be made to clarify this muddled area of the law.

I. THE CONTINUING PROBLEM OF SOVEREIGNTY LIMITATIONS

A. *King Pennoyer III*

In *World-Wide Volkswagen Corp. v. Woodson*,⁹ the Supreme Court stated that the due process clause protects two separate and independent interests in any exercise of personal jurisdiction over a non-resident defendant. First, the defendant has a personal right to be free from the burdens of distant litigation unless he has "minimum contacts" with the forum.¹⁰ Second, even if the defendant suffers no burdens of distant litigation, the independent sovereignty interests of the defendant's state nonetheless must be satisfied through a finding of minimum contacts.¹¹ The sovereignty interest articulated in *World-Wide* is not the interest of the defendant's state in protecting the defendant. An unburdened defendant has no need of protection, and a burdened defendant is protected by the minimum contacts test regardless of the defendant's state's interest. Rather, the relevant interest of the defendant's state is "the sovereign power to try causes" involving its residents that are instead tried in a state chosen by the

6. Recent cases showing confusion, rebellion, or both, include: *Armstrong v. Pomerance*, 423 A.2d 174, 176-77 (Del. 1980) (upholding jurisdiction on contacts held insufficient in *Shaffer v. Heitner*, 433 U.S. 186 (1977)); *Humphrey v. Langford*, 246 Ga. 732, 733-34, 273 S.E.2d 22, 23-24 (1980) (transient jurisdiction upheld despite lack of minimum contacts); *West Am. Ins. Co. v. Westin, Inc.*, 337 N.W.2d 676, 681 (Minn. 1983) (Wisconsin tavern not subject to Minnesota long-arm and dram shop acts under *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)). The difficulty of Professor Casad's undertaking is illustrated by *Westin*. Based on the cases he surveyed, he had predicted that jurisdiction would be asserted in a case like *Westin*. R. Casad, *supra* note 3, ¶ 7.02[2][b][ii], at 7-11 (1983)).

7. 52 U.S.L.W. 4346 (U.S. Mar. 20, 1984).

8. 52 U.S.L.W. 4349 (U.S. Mar. 20, 1984).

9. 444 U.S. 286 (1980).

10. *Id.* at 291-92 (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

11. *Id.* at 294.

plaintiff.¹² Under *World-Wide*, if minimum contacts are not established, the forum state, in effect, is violating the "due process rights" of the defendant's state when it hears the plaintiff's case—even if the defendant himself suffers no burden in defending in the forum state. In the absence of minimum contacts, the forum state is acting beyond its sovereign power and encroaching on the sovereign powers of a sister state.

The Robinsons, plaintiffs in *World-Wide*, understandably could be surprised that they would have to sue both a tri-state distributor and a local seller of automobiles in the distant state of sale (New York), as opposed to the place of damage (Oklahoma). Neither objecting defendant in *World-Wide* pointed to any extra burden it would incur by defending in Oklahoma. In fact, the Court in *World-Wide* recognized that in the modern world of instant communication and transportation—not to speak of insurance—the cases in which a defendant would be burdened by distant litigation would be relatively rare.¹³ Furthermore, in *World-Wide* it could be legitimately argued that because the evidence and witnesses were in Oklahoma, a suit in that state would be more convenient for defendants than a suit in New York.¹⁴ Therefore, anyone trying to explain to the Robinsons why they

12. *Id.* at 293.

13. The Court cited language from the expansive opinion in *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957): "With . . . increasing nationalization of commerce has come a great increase in the amount of business conducted . . . across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." 444 U.S. at 293. The court in *World-Wide* concluded: "The historical developments noted in *McGee*, of course, have only accelerated in the generation since that case was decided." *Id.*

It has been argued that because the due process clause even protects against minimal deprivations, a non-resident defendant will almost always suffer a protectible deprivation (burden) in being sued away from "home." See Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup. Ct. Rev. 77, 85 n.48 (citing as an example *Fuentes v. Shevin*, 407 U.S. 67 (1972) (temporary deprivation of possessory interest in household goods implicates due process clause)). Many defendants today, however, will have difficulty showing burdens of distant litigation sufficient to meet even the de minimis standards suggested. Insurance coverage and cost spreading both shift the burden of litigation away from many defendants. Further, cases will arise in which litigation will require the defendant's presence in the state at any rate. See *Jones v. Calder*, 138 Cal. App. 3d 128, 137, 187 Cal. Rptr. 825, 832 (1982) (individual defendants would be present in forum as witnesses in litigation to which corporate defendant is subject; jurisdiction permissible because individuals not burdened), *aff'd on other grounds*, 52 U.S.L.W. 4349 (U.S. Mar. 20, 1984). Finally, if we are truly concerned with protecting defendants from the burdens of distant litigation, a sovereignty-oriented theory based on haphazard state lines is ill-designed for the purpose. See *Buckley v. New York Post Corp.*, 373 F.2d 175, 184 (2d Cir. 1967).

14. See 444 U.S. at 294.

had to hobble to New York to sue two corporations would have to say sheepishly: "It's because of a concept; it has nothing to do with you or the defendants. It has nothing to do with where your case can be tried most conveniently. It's because of an idea we call 'sovereignty.' You are only pawns in the game of federalism."

As Professor Casad stresses, the talismanic result in *World-Wide* is symptomatic of the formalistic legal reasoning,¹⁵ particularly the reliance on fictional sovereignty interests, employed by the Supreme Court in its 100-year bout with principles of personal jurisdiction.¹⁶ The progenitor of these theoretical sovereignty limitations was of course Justice Field's opinion in *Pennoyer*.¹⁷ The Court in *Pennoyer* held, in effect, that sovereign interests of other states were protected by the due process clause from the forum state's assertion of jurisdiction over a non-resident. According to *Pennoyer*, due process could only be satisfied through actual presence of the defendant or his property in the forum.

*International Shoe Co. v. Washington*¹⁸ expanded the possibility of compliance with the due process clause beyond the limitations of presence to include situations in which the defendant has minimum contacts with the forum.¹⁹ The Court in *International Shoe*, however, did not upset *Pennoyer*'s morganatic marriage of due process and sovereignty limitations. It merely added the personal interest of the defendant in avoiding the burdens of distant litigation to the due process formula. The due process clause continued to protect abstract notions of territorial sovereignty. Any doubt on this point was erased by *Hanson v. Denckla*,²⁰ in which the Court expressly relied on the continued validity of sovereignty and territoriality limitations embodied in the due process clause. This reliance on the shibboleth of sovereignty earned *Hanson* the mantle of "King *Pennoyer* II."²¹

15. See C. Llewellyn, *The Common Law Tradition: Deciding Appeals* 38-39 (1960).

16. See R. Casad, *supra* note 35, ¶ 2.01-.04.

17. For a penetrating criticism of Justice Field's ill-considered application of international sovereignty principles to a union of federal states, see Hazard, *A General Theory of State-Court Jurisdiction*, 1965 S. Ct. Rev. 241, 252-72.

18. 326 U.S. 310 (1945).

19. As Professor Ehrenzweig noted, the "extreme flexibility" of the minimum contacts test is on its face "hardly preferable to the extreme rigidity" of the power and presence doctrine that *International Shoe* supposedly replaced. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 Yale L.J. 289, 312 (1956).

20. 357 U.S. 235 (1958).

21. See Ehrenzweig, *From State Jurisdiction to Interstate Venue*, 50 Or. L. Rev. 103, 104 (1971) (*Hanson* described as "King . . . *Pennoyer* II with all the sins and sorrows of his late ancestor").

In *Shaffer v. Heitner*,²² the Court appeared to open a new jurisdictional era in which due process limitations would be relevant only insofar as necessary to protect against the burdens of distant litigation. The Court promisingly stated: "[T]he relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction."²³

Unfortunately, the apparent attempt in *Shaffer* to eradicate sovereignty interests from due process analysis was doomed to failure by the Court's test for determining when due process would be satisfied. In defining the throwaway terms from *International Shoe*—"fairness" and "minimum contacts"—the Court in *Shaffer* opted for the defendant's contacts approach,²⁴ rather than the balance of interests approach.²⁵ Both approaches can lay claim to being the proper interpretation of *International Shoe*'s due process/fairness doctrine.²⁶ Under the defendant's contacts approach, due process is satisfied only when the defendant has purposefully created and controlled sufficient contacts with the forum state.²⁷ In contrast, the more expansive balance of interests approach to fairness allows a court to consider several pragmatic factors relevant to the due process inquiry, including: the actual inconvenience that the defendant would suffer by defending in the forum; the legitimate interest of the forum in hearing the case; whether the case could be conveniently tried in the forum; and whether the plaintiff would be inconvenienced by suing elsewhere.²⁸

The defendant's contacts approach requires a hypertechnical analysis to determine whether in-state activity can be attributed to, or "counted" against, the defendant.²⁹ In *Shaffer*, for example, the Court held that ownership of stock and acceptance of a directorship in a

22. 433 U.S. 186 (1977).

23. *Id.* at 204. In reaching this retrospective interpretation, the Court in *Shaffer* was faced with its previous reliance on sovereignty principles in *Hanson*. The Court explained *Hanson* as "simply" making the point "that the States are defined by their geographical territory." 433 U.S. at 204 n.20. This explanation is notably unconvincing; the majority in *Hanson* surely was doing more than giving its readers a lesson in elementary geography.

24. See Nordenberg, *State Courts, Personal Jurisdiction and the Evolutionary Process*, 54 Notre Dame Law. 587, 618-30 (1979).

25. See R. Casad, *supra* note 3, ¶ 2.02[4][b], at 2-22.

26. See Nordenberg, *supra* note 24, at 593-96.

27. See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

28. The balancing approach was adopted in *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223-24 (1957). It is remarkably similar to the "forum conveniens" approach advocated by Professor Ehrenzweig. See Ehrenzweig, *supra* note 19, at 312-14.

29. See Brilmayer, *supra* note 13, at 80, 112.

Delaware corporation were not countable contacts with Delaware.³⁰ Similarly, the Court in *World-Wide* held that the presence of an automobile in Oklahoma was not countable against the seller or distributor, although presence of the automobile in the state of sale would have been countable.³¹ Courts before *World-Wide* understandably had failed to make this distinction when "counting" contacts.³²

Shaffer's unfortunate perpetuation of the defendant's contacts approach to minimum contacts left the door open for re-entry of abstract sovereignty limitations into due process analysis. It is possible that in many cases a defendant without "purposeful" or "countable" contacts with the forum will nonetheless suffer no meaningful inconvenience when sued in that forum.³³ If the defendant suffers no burden from distant litigation, he has suffered no deprivations that are protected by the due process clause. In such a situation, the lack of defendant's contacts should not prohibit assertion of jurisdiction unless the defendant's contacts test protects other interests besides those personal to the defendant. If defendant's contacts are required as a *sine qua non*, as the Court in *Shaffer* appeared to hold, a court ultimately must search for other interests besides the defendant's to support the existence of the test. The conceptual sovereignty interest of the defendant's state in trying the case in its courts is the only available candidate for such support.

The Court in *Shaffer* was able under the facts to avoid the sovereignty dilemma inherent in the defendant's contacts approach. In *Shaffer*, the defendant's contacts test was used to protect individual defendants who clearly would have been burdened by litigation in the forum state.³⁴ Similarly, the Court in *Kulko v. Superior Court*³⁵ did not mention sovereignty concepts because the defendant would have been burdened by litigation in the forum state.³⁶ But when the defendants in *World-Wide* could point to no similar burdens, continued adherence to the defendant's contacts test forced the Court to retreat to *Pennoyer* conceptualisms. The Court in *World-Wide* thus stifled the ill-fated attempt in *Shaffer* to repudiate sovereignty limitations on jurisdiction. The only difference between *World-Wide* and *Pennoyer* therefore lies in the facts that must exist before sovereignty interests are satisfied: Countable "contacts" are required instead of physical

30. 433 U.S. at 216.

31. 444 U.S. at 295-98.

32. See R. Casad, *supra* note 3, ¶ 7.02[2][c][iii], at 7-25 to -26.

33. An example would be the factual situation in *World-Wide* or, even better, a situation in which the tri-state distributor in that case was sued not in Oklahoma but in Pennsylvania, just across the state line from its principal place of business in New Jersey. See *World-Wide*, 444 U.S. at 301 & n.1 (Brennan, J., dissenting).

34. See 433 U.S. at 216.

35. 436 U.S. 84 (1978).

36. See *id.* at 91.

"presence." This is not much of a difference, however, because physical presence is a very important factor in determining whether the defendant's contacts test has been met.³⁷ *World-Wide* clearly has earned the title of "King Pennoyer III."³⁸

As Professor Casad aptly notes, the Court's questionable reliance on theoretical sovereignty limitations has created great uncertainty regarding the proper application of jurisdictional principles.³⁹ Lower courts left to apply an outmoded theory in the modern era of interstate communication and transportation are bound to be less than predictable in their outcomes.⁴⁰

B. *The End of the Pennoyer Dynasty?*

The ultimate irony of a theory that imports sovereignty limitations into due process analysis is that it is based on a fundamentally flawed construction of the due process clause itself.⁴¹ The due process clause regulates the relationship between state and citizen. It says nothing whatsoever about relationships among the states.⁴² The due process clause patently is not an "instrument of interstate federalism" as the Court in *World-Wide* claimed.⁴³

37. See *infra* notes 83-91 and accompanying text.

38. See R. Casad, *supra* note 3, ¶ 2.04[2][e], at 2-59 to -61.

39. *Id.* ¶ 2.05, at 2-64.

40. See Note, Bauxites' "Individual Liberty Interest" and the Right to Control Amenability to Suit in Personal Jurisdiction Analysis, 51 Fordham L. Rev. 1278, 1287 & n.53 (1983) (post-*World-Wide* cases in which lower courts did not even discuss sovereignty interests) [hereinafter cited as *Amenability to Suit*]. In *Paolino v. Channel Home Centers*, 668 F.2d 721 (3d Cir. 1981), the court held that similarities in substantive law between the forum state and defendant's state satisfied the sovereignty interests stressed in *World-Wide*. *Id.* at 724. The court in *Paolino* failed to note that the sovereignty interest identified by *World-Wide* was the interest of defendant's state in trying the case in its own courts. 444 U.S. at 294. Even if the forum state applied the law of defendant's state, the sovereignty interest stressed in *World-Wide* would not be satisfied.

Further inconsistency is illustrated by *Donahue v. Far E. Air Transp. Corp.*, 652 F.2d 1032 (D.C. Cir. 1981), in which the court applied due process sovereignty limitations to protect the sovereign interests of Taiwan, *id.* at 1039, even though *World-Wide* referred to the due process clause as an "instrument of interstate federalism," 444 U.S. at 294 (emphasis added).

41. See Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 Nw. U.L. Rev. 1112, 1113-14 (1981); *Supreme Court*, 1979 Term, 94 Harv. L. Rev. 75, 113-16 (1980).

42. Unlike the text of the full faith and credit clause, U.S. Const. art. IV, § 1, which specifically regulates interstate relationships, the due process clause makes no mention of federalism concepts. For the view that the full faith and credit clause, and not the due process clause, is the proper regulator of interstate forum allocation, see Justice O'Connell's dissenting opinion in *State ex rel. White Lumber Sales, Inc. v. Sulmonetti*, 252 Or. 121, 130-33, 448 P.2d 571, 575-77 (1968).

43. 444 U.S. at 294.

The Court, somewhat sheepishly, apparently has recognized the fallacy of its constitutional construction of due process begun in *Pennoyer* and perpetuated in *World-Wide*. In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,⁴⁴ the Court was faced squarely with one of the anomalous legacies of *Pennoyer* and *World-Wide*: Assuming that a defendant could waive his own objection to personal jurisdiction⁴⁵ even in the absence of minimum contacts, how could he waive his state's independent sovereign right to try the case in its own courts? It would seem that under *World-Wide*, if the defendant's contacts test is not satisfied, the defendant's state's sovereignty interest prohibits assertion of jurisdiction regardless of anything the defendant may say.⁴⁶

The Court in *Bauxites* nonetheless held that a forum could exercise jurisdiction over a defendant who waived his personal right to object to personal jurisdiction.⁴⁷ This means that there will be situations in which a court will adjudicate a controversy notwithstanding the absence of defendant's contacts. The Court's explanation of how this could be allowed, despite the apparent violation of the independent sovereignty interests of defendant's state, was secreted in a footnote:

It is true that we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-a-vis other States. . . . The restriction on state sovereign power described in [*World-Wide*], however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.⁴⁸

As noted by Professor Casad,⁴⁹ and by Justice Powell's concurring opinion,⁵⁰ the implications of the Court's apparent retreat from sover-

44. 456 U.S. 694 (1982).

45. The lower court imposed personal jurisdiction on the defendant for refusal to comply with orders to submit to jurisdictional discovery. *Id.* at 699; see Fed. R. Civ. P. 37(b)(2)(A).

46. The court in *World-Wide* unwittingly brought the doctrine of personal jurisdiction perilously close to the doctrine of subject matter jurisdiction. As is true with subject matter jurisdiction, it appeared after *World-Wide* that litigants could not supply the power to assert personal jurisdiction that a court did not have. Cf. *Louisville & N.R.R. v. Mottley*, 211 U.S. 149, 153 (1908) (parties may not waive lack of subject matter jurisdiction).

47. 456 U.S. at 703.

48. *Id.* at 702 n.10 (emphasis added).

49. R. Casad, *supra* note 3, ¶ 2.04[2][e][iii], at 2-61 n.177. *Bauxites* was decided as the book was being edited, so we must wait for the supplements to receive Professor Casad's full treatment of the case. Professor Casad's preliminary observation that the Court's position on sovereignty "remains obscure," however, is quite to the point. See *infra* notes 65-71 and accompanying text.

50. 456 U.S. at 710.

eighty principles are obscure but potentially far-reaching. The Court in *Bauxites* suggests that the defendant's state's sovereignty interest under the due process clause is really the same as the defendant's personal interest in avoiding the burdens of distant litigation.⁵¹ If the sovereign interest is coterminous with defendant's interest, however, it is not a relevant interest at all: It is fully satisfied, for example, not only when defendant fails to properly object to jurisdiction, as in *Bauxites*, but also when defendant *has* no objection because he is not burdened by distant litigation. Under this broad view of *Bauxites*, the independent sovereign interest of defendant's state in trying the case in its own courts has been dropped from consideration under the due process clause because it is unrelated to the defendant's personal due process interest.⁵²

If the Court in *Bauxites* meant to jettison the defendant's state's conceptual interest in hearing the case from jurisdictional consideration, the applicability of the defendant's contacts test will be relatively limited. A court would not even have to look for countable contacts if the defendant was not burdened by litigating in the forum; the lack of burden would be enough to satisfy both the defendant's personal due process interest and the coterminous interest of defendant's state in protecting its resident.⁵³ Given the omnipresence of insurance and advances in transportation and communication, it would not be unreasonable to predict that a defendant's contacts analysis would be unnecessary in many cases. Long-arm statutes requiring enumerated acts by the defendant in the state would be unnecessarily limited. Amendments to such statutes would be possible, providing for jurisdiction even in the absence of purposeful contacts if defendant would not be inconvenienced by litigation in the forum.

On the other hand, it is rather a leap to conclude that a brave new world of jurisdiction without formalistic sovereignty limitations was ushered in by *Bauxites*. It is unlikely that the Court intended to deformalize the law of jurisdiction by way of a cryptic footnote—especially when the formalism of sovereignty had been so recently and forcefully stressed in *World-Wide*. A more limited view of *Bauxites* is that it permits a defendant to waive an objection to the lack of minimum contacts, despite the violation of the independent sovereign right of the defendant's state to try the case in its courts. As Justice

51. *Id.* at 702 & n.10.

52. See generally Redish, *supra* note 41 (federalism concerns not proper in due process analysis).

53. While the defendant's state under *World-Wide* has an independent interest in trying the case in its own courts, such an interest would no longer be relevant to the due process analysis under this broad interpretation of *Bauxites*.

Powell notes, this view is irreconcilable with the axiom that the Federal Rules of Civil Procedure, under which waiver of the jurisdictional objection was found in *Bauxites*,⁵⁴ do not expand the jurisdictional power of federal district courts.⁵⁵ If the Court is willing to live with such an anomaly, the importance of the defendant's contacts test is not diminished unless the defendant consents in some way to jurisdiction.

Under the limited view of *Bauxites* as a waiver exception, a defendant still may object to jurisdiction in the absence of purposeful contacts, despite the fact that he would not be inconvenienced by litigating in the forum. The defendant, loyal citizen that he is, is allowed to raise his state's objection to the violation of its independent sovereign interest to try the case in its own courts. Thus, the Robinsons must still travel to New York because of a concept. As Professor Casad states, it is hard to believe that the Court can make so much out of an outmoded concept after all this time.⁵⁶ Yet reliance on the abstract notion of sovereignty is the clear import of *World-Wide*. It would be risky to presume that the Court in *Bauxites* totally abandoned its intent to govern state court jurisdiction by formalistic limitations.⁵⁷

The current role of sovereignty limitations was further obscured by the Court's recent cryptic references to *Bauxites* in *Keeton v. Hustler Magazine, Inc.*⁵⁸ Defendant Hustler was sued for libel in New Hampshire, in which it sold between 10,000 and 15,000 copies of its magazine each month. The plaintiff, a non-resident, sued in New Hamp-

54. In *Bauxites*, the lack of minimum contacts was considered waived by the defendant's failure to comply with jurisdictional discovery. See Fed. R. Civ. P. 37(b)(2)(A). Another waiver possibility exists under Fed. R. Civ. P. 12(h)(1), which provides for waiver of jurisdictional objections if not made in the motion to dismiss, or in the answer if a motion to dismiss is not made.

55. 456 U.S. at 715 (Powell, J., concurring); see Fed. R. Civ. P. 82. The same anomaly exists in state courts if state rules of procedure allow waiver of a defendant's right to object to jurisdiction. See, e.g., Cal. Civ. Proc. Code § 430.80 (West 1973); N.Y. Civ. Prac. Law § 3211(e) (McKinney 1972); Ohio R. Civ. P. 12(h). This would result in the forum state's hearing the case, absent minimum contacts, in violation of the defendant's state's sovereign right to try the case in its own courts.

56. R. Casad, *supra* note 3, ¶ 2.04[2][e][ii], at 2-61.

57. Other interpretations of *Bauxites* have been suggested. See Note, *Personal Jurisdiction in Flux: Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 69 Cornell L. Rev. 136, 161 (1983) (Court's mention of individual liberty interest in dictum does not require a finding of purposeful contact in all cases); *Amenability to Suit*, *supra* note 40, at 1289-90 (*Bauxites* replaces independent sovereignty interest with individual liberty interest; requires finding of purposeful contacts or waiver even though defendant suffers no inconvenience from litigating in the forum).

58. 52 U.S.L.W. 4346 (U.S. Mar. 20, 1984). Justice Rehnquist wrote the majority opinion for eight justices. Justice Brennan wrote an opinion concurring in the judgment.

shire to take advantage of its six-year statute of limitations.⁵⁹ The suit was for injuries suffered not only in New Hampshire, but in every other state.⁶⁰

The Court began its jurisdictional analysis by noting that Hustler's purposeful circulation within New Hampshire would ordinarily satisfy the minimum contacts test.⁶¹ Justice Rehnquist then addressed three concerns that the lower court felt took the case out of the ordinary defendant's contacts analysis: (1) the plaintiff was suing for multi-state damages under the single publication rule; (2) the plaintiff was exploiting an unusually long statute of limitations; and (3) the plaintiff was a non-resident.⁶²

The Court quickly disposed of the statute of limitations and non-resident plaintiff concerns, holding that neither was relevant to the jurisdictional inquiry.⁶³ The fact that plaintiff was suing to collect

59. New Hampshire was the only state in which the plaintiff's cause of action was still timely. See *Keeton v. Hustler Magazine, Inc.*, 682 F.2d 33, 35 (1st Cir. 1982), *rev'd*, 52 U.S.L.W. 4346 (U.S. Mar. 20, 1984).

60. The plaintiff's multi-state libel action was made possible by the single publication rule, which allows all damages suffered in all jurisdictions to be recovered in a single action. 52 U.S.L.W. at 4346, 4347-48; Restatement (Second) of Torts § 577A(4) (1977). By preventing piecemeal litigation in each state, the single publication rule is usually beneficial to defendants. 52 U.S.L.W. at 4348; Restatement (Second) Torts § 577A comment f (1977). In *Keeton*, however, the operation of the single publication rule in tandem with the six-year statute of limitations could allow the plaintiff to collect damages suffered in forty-nine states in which she could not even bring a timely action.

61. 52 U.S.L.W. at 4347. In stressing the continued validity of the minimum contacts test, the court relied on *International Shoe*, 326 U.S. at 317, and *World-Wide*, 444 U.S. at 297-98.

62. 52 U.S.L.W. at 4347.

63. *Id.* at 4347-48. The Court stated that the statute of limitations problem was purely a choice of law question, relying on the separation of choice of law analysis from jurisdictional analysis in *Hanson v. Denckla*, 357 U.S. 235, 254 (1958). Justice Rehnquist concluded that "we do not think that such choice of law concerns should complicate or distort the jurisdictional inquiry." 52 U.S.L.W. at 4348. By keeping the choice of law and jurisdictional inquiries separate, the Court remained faithful to the defendant's contacts approach to minimum contacts. See *supra* notes 24-33 and accompanying text. Under the more wide-ranging balance of interests approach to minimum contacts, a state that has an interest in applying its law will generally have a legitimate interest in exercising jurisdiction. This forum state interest is an important factor in determining whether jurisdiction is permissible under the balance of interests approach. See *Shaffer*, 433 U.S. at 224-27 (Brennan, J., dissenting).

As to the non-resident plaintiff concern, the Court stated that the test for minimum contacts was whether the defendant, not the plaintiff, had sufficient controllable contacts with the forum state. Plaintiff's residency within the forum would be relevant only insofar as it affected defendant's forum state activity. The Court stated: "Plaintiff's residence may be the focus of the activities of the defendant out of which the suit arises. But plaintiff's residence in the forum State is not a separate requirement, and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts." 52 U.S.L.W. at 4348 (emphasis added).

damages for both out-of-state and in-state injury under the single publication rule, however, was considered relevant to due process limitations on jurisdiction. The Court stated: "[I]t is certainly relevant to the jurisdictional inquiry that [plaintiff] is seeking to recover damages suffered in all states in this one suit. . . . That is, the contacts between respondent and New Hampshire must be such that it is 'fair' to compel respondent to defend a multistate lawsuit. . . ." ⁶⁴ The

The Court reiterated this point in dictum in its recent decision in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 52 U.S.L.W. 4491 (U.S. April 24, 1984). In *Hall*, non-resident plaintiffs sued the defendant in Texas on a cause of action that did not arise from the defendant's contacts with that state. The Court held that the defendant's countable contacts did not support general jurisdiction. *Id.* at 4493. The Court did not consider the plaintiff's non-residence a factor in this decision, stating that a plaintiff's "lack of residential or other contacts with Texas of itself does not defeat otherwise proper jurisdiction." *Id.* at 4492 n.5.

The Court's rejection of the relevance of the plaintiff's non-residence also reflects a strict adherence to the defendant's contacts approach to fairness. Under the balance of interests approach, a state's interest in adjudicating a case may be significantly less when the plaintiff is a non-resident. See *Minichiello v. Rosenberg*, 410 F.2d 106, 110 (2d Cir.), *aff'd on reh'g en banc*, 410 F.2d 117 (1968), *cert. denied*, 396 U.S. 844 (1969). On the other hand, in *Keeton's* companion case, *Calder v. Jones*, 52 U.S.L.W. 4349 (U.S. Mar. 20, 1984), the Court appeared to keep the door open for plaintiff-oriented factors to substitute for a lack of defendant's contacts. In *Calder*, plaintiff was a resident of the forum. The Court defined its minimum contacts test as follows:

In judging minimum contacts, a court properly focuses on "the relationship among the defendant, the forum, and the litigation." *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977). The plaintiff's lack of "contacts" will not defeat otherwise proper jurisdiction, but they may be so manifold as to permit jurisdiction when it would not exist in their absence. Here the plaintiff is the focus of the activities of the defendants out of which the suit arises.

Id. at 4350-51 (citations omitted) (emphasis added). This language may indicate that while defendant's contacts are sufficient notwithstanding the lack of plaintiff's contacts, the existence of significant plaintiff contacts in the forum can substitute for a lack of defendant's contacts. This broad reading comports with a balance of interests approach to minimum contacts under which defendant's contacts are not a *sine qua non* if other relevant factors, such as the interest of a resident plaintiff in suing conveniently, exist.

However, a more limited view of the loose language in *Calder* is possible. The Court may have been stressing that plaintiff's residency is only relevant to the extent that plaintiff was a target of defendant's purposeful in-state contacts. In light of the Court's reference in *Keeton* to the plaintiff as the focus of defendant's in-state contacts, this is probably what the Court intended. *Keeton*, 52 U.S.L.W. at 4348 (citing *Calder*; defendant's relationship with a resident plaintiff may "enhance defendant's contacts with the forum"); see *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 52 U.S.L.W. 4491 n.51 (U.S. Apr. 24, 1984) (plaintiff's residence not an independent factor, but in-state residence may enhance defendant's contacts). Thus, the Court probably still rejects the plaintiff's interest in suing conveniently as an appropriate inquiry under the minimum contacts test.

64. 52 U.S.L.W. at 4347 (emphasis added).

question for the Court was how the ordinary finding of defendant's contacts, with which the Court began its analysis, would be affected by the fact that plaintiff was bringing a multi-state damage action.

With the multi-state aspect of the litigation apparently in mind, the Court addressed the lower court's contention that New Hampshire's interest in adjudicating an action based mainly on out-of-state injuries was minimal. Stating that the forum state's interest in the litigation, or lack of it, was relevant to the due process inquiry,⁶⁵ the Court made a cryptic reference to *Bauxites*:⁶⁶ "But insofar as the state's 'interest' in adjudicating the dispute is a part of the Fourteenth Amendment due process equation, as a surrogate for some of the factors already mentioned, see [*Bauxites*], we think the interest [herein] is sufficient."⁶⁷

The reference to *Bauxites* in *Keeton* is extremely curious because it does not refer directly to the sovereignty issues with which *Bauxites* was concerned. *Bauxites* questioned the *World-Wide* proposition that the sovereignty interests of sister states in hearing a case act independently of the defendant's interests as a limitation on the forum state. The bulk of the Court's analysis in *Keeton* focused on a different factor, which is also independent of defendant's personal interests—whether the forum state is sufficiently interested in hearing the litigation. Strictly speaking, a defendant has no complaint about a forum's interest or lack thereof if: (1) he has sufficient contacts, as the Court admitted was the case in *Keeton*; (2) he is not burdened by distant litigation; or (3) he has waived his jurisdictional objection. Yet the Court in *Keeton* appeared to recognize an objection to a lack of a forum state's interest even though the defendant had no personal complaint about defending in the forum. This is *World-Wide* in different clothing: In *World-Wide*, the defendants could argue a violation of a sister state's sovereignty even when they had no personal complaint regarding jurisdiction; in *Keeton*, the defendant could argue a lack of forum interest even when it had no personal complaint regarding jurisdiction.⁶⁸

65. The Court cited *World-Wide* and *McGee* for this proposition. *Id.* By holding the forum state's interest relevant, the Court once again perpetuated uncertainty as to whether it has truly abandoned the balance of interests approach to fairness in favor of the defendant's contacts approach. See *infra* note 76.

66. The First Circuit did not refer to *Bauxites* in its decision below. *Keeton v. Hustler Magazine, Inc.*, 682 F.2d 33 (1st Cir. 1982), *rev'd*, 52 U.S.L.W. 4346 (U.S. Mar. 20, 1984).

67. 52 U.S.L.W. at 4347 (emphasis added). The court found New Hampshire's interest in adjudicating the dispute sufficient on two grounds: 1) as to the in-state damages, New Hampshire has an obvious interest in deterring tortious in-state activity; 2) as to the out-of-state damages, New Hampshire, in cooperation with other states, has an interest in efficient litigation of a multi-state libel in a single action. *Id.* at 4347-48.

68. This *World-Wide*-like proposition provoked a concurrence from Justice Brennan. He contended that the majority's inquiry into the forum state's interest was

It is unclear whether *Keeton* mandates a separate forum interest inquiry in every case. The Court undertook its forum interest analysis only because, unlike the ordinary case, the plaintiff in *Keeton* sought multi-state damages. However, given the generalized way in which the Court ultimately discussed the forum interest limitation,⁶⁹ its consideration of forum interest factors is potentially far-reaching. If *Keeton* is generally applicable, it may require an analysis that differs from both *World-Wide* and the broad view of *Bauxites*. Contrary to this view of *Bauxites*, a defendant will still be allowed to set forth a surrogate jurisdictional objection that does not bear upon his own personal interest in avoiding distant litigation. Contrary to *World-Wide*, this non-personal objection will not be grounded in the defendant's state's interest in trying the case in its own courts. Rather, the objection—whether labelled as a sovereignty objection or something else—will be grounded in the forum state's lack of interest in trying the case in its courts.

If lack of forum interest is the only surrogate objection that defendants are allowed after *Keeton*, however, the effect on plaintiffs will not be drastic. Plaintiffs normally choose a forum interested in hearing the litigation.⁷⁰ Moreover, if the plaintiff is a forum resident, any surrogate forum interest objection would be easily satisfied, because the forum state has an obvious interest in allowing a resident to use its courts and sue conveniently.⁷¹ Indeed, the result in *World-Wide* itself would be different if a lack of forum interest were defendants' only available surrogate objection: Oklahoma clearly had an interest in hearing litigation arising out of an in-state accident, notwithstanding the defendants' lack of countable contacts in the state.

While the forum interest, or forum disinterest, argument available to defendants after *Keeton* is relatively harmless, it is dangerous to allow defendants any objection that is not derived from a personal interest in avoiding the burdens of distant litigation. As Justice Brennan stressed in his *Keeton* concurrence, such a gift to defendants is improper under a broad view of *Bauxites*.⁷² Moreover, the *Keeton* analysis may allow the defendant to dredge up other surrogate objec-

inappropriate after *Bauxites* because the defendant had sufficient contacts with New Hampshire, and therefore had no personal complaint regarding jurisdiction. *Id.* at 4349 (Brennan, J., concurring).

69. "We agree that the 'fairness' of haling respondent into a New Hampshire court depends to some extent on whether . . . that state [has] a legitimate interest in holding respondent answerable . . ." *Id.* at 4347.

70. This is especially true for plaintiffs who forum shop for a favorable choice of law. If the forum state is interested enough to apply its favorable law, it is certainly interested enough to hear the case under *Keeton*.

71. See *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957).

72. 52 U.S.L.W. at 4349 (Brennan, J., concurring).

tions to jurisdiction, such as an objection to a lack of purposeful contacts even though the defendant is not burdened by distant litigation. *Keeton* did not deal with this surrogate argument, because the defendant clearly had purposeful, countable contacts with the forum.⁷³ *Keeton* keeps the spirit of *World-Wide* alive, however, by allowing defendants to make objections that do not affect their personal interests. It remains to be seen whether *World-Wide's* specific surrogate objection retains vitality.

The effect of *Bauxites* and *Keeton* on *World-Wide* must be resolved before lower courts can approach uniformity in treating minimum contacts objections by unburdened defendants.⁷⁴ Yet clarity and predictability of result, while necessary, are not sufficient. The Supreme Court must not solve the sovereignty conflict by a "clear" retreat to *Pennoyer*, but by a clear advance in accordance with the realities of commercial and personal activity. The clarity of the rule adopted is important, but not as important as the result.⁷⁵ If the Court reverts to *World-Wide* and requires countable contacts to protect an independent sovereignty interest (or any other interest that can be dreamed up), some predictability undoubtedly will follow in the era of "King *Pennoyer* IV."⁷⁶ Any added clarity, however, would be obtained at

73. *Id.* at 4348-49.

74. Lower court decisions after *Bauxites* unsurprisingly have been varied. Different panels of the Fifth Circuit, for example, have reached contradictory conclusions. See *DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260, 1270-72 (5th Cir. 1983) (*Bauxites* replaces sovereignty interest with personal liberty interest; does not require defendant's contacts as a *sine qua non*); *Talbot Tractor Co. v. Hinomoto Tractor Sales, USA*, 703 F.2d 143, 145-46 (5th Cir. 1983) (no citation to *Bauxites*; *World-Wide's* view of sovereignty limitations and defendant's contacts dispositive); see also *Vishay Intertechnology, Inc. v. Delta Int'l Corp.*, 696 F.2d 1062, 1068-69 (4th Cir. 1982) (no citation to *Bauxites*, but court appears to retreat from sovereignty analysis). It is unlikely that the Court's ambiguous reference to *Bauxites* in *Keeton* will help lower courts determine the vitality of sovereignty limitations.

75. Cf. LaFave, *The Fourth Amendment in an Imperfect World: on Drawing "Bright Lines" and "Good Faith"*, 43 U. Pitt. L. Rev. 307, 325-26 (1982) (bright line rules should produce results approximating accurate case-by-case application of a reasonable underlying principle).

76. No one would contend that a defendant's contacts approach could ever result in unerring predictability of a jurisdictional result. A mere glance at the long-arm cases catalogued in Professor Casad's book shows that contrary results are reached in very similar fact situations. Moreover, the Supreme Court has been reluctant to abandon the more broad-ranging "balancing of interests" approach to due process embodied in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). See *Calder v. Jones*, 52 U.S.L.W. 4349, 4351 (U.S. Mar. 20, 1984) ("plaintiffs' [contacts] . . . may be so manifold as to permit jurisdiction when it would not exist in their absence"); *World-Wide*, 444 U.S. at 292 (balancing of interests may be relevant in appropriate case). As long as *McGee* retains a semblance of vitality, it is possible for a lower court to downplay an apparent lack of defendant's contacts and emphasize plaintiff and forum interests. See *Hall v. Helicopteros Nacionales de Columbia, S.A.*, 638 S.W.2d 870, 873 (Tex. 1982) (jurisdiction asserted over foreign cause of action in "spirit" of *McGee*), *rev'd*, 52 U.S.L.W. 4491 (U.S. Apr. 24, 1984).

the expense of plaintiff's countervailing interest in suing conveniently, the forum state's interest in protecting the plaintiff, and the need for judicial efficiency. Most importantly, blind adherence to the defendant's contacts rule will mean that a defendant who suffers no inconvenience by defending in the forum receives a windfall by invoking an abstract limiting rule—an "unjustified veto power" over plaintiff's choice of forum.⁷⁷ A rule that can be justified only because it is clear is no better than the same rule justified by the legal formalism of sovereignty.⁷⁸

In reversing *Hall*, the Supreme Court focussed exclusively on the insufficiency of the defendant's contacts with the forum. The Court may thus have adopted the defendant's contacts approach to fairness once and for all. It is significant, however, that the Court did not attack the lower Court's *McGee*-like analysis. Furthermore, the Court did not discuss whether other interests, such as the interest of the plaintiff in suing conveniently and the interest of the forum in hearing the case, could substitute for a lack of defendant's contacts. Such a discussion was unnecessary in *Hall*, because Texas' interests in the litigation was minimal, the plaintiffs were non-residents, and the most convenient forum was probably Peru, where the cause of action arose. The Texas Court's error, therefore, was in asserting that a *McGee*-like balance of interests approach would allow jurisdiction in Texas. The Court in *Hall*, therefore, did not necessarily reject the *McGee* approach for cases in which the *McGee* factors are present.

Finally, even assuming that the defendant's contacts/purposeful availment test becomes a clearly articulated *sine qua non*, courts will continue to have difficulty determining which contacts are "countable" against a defendant. See *Lakeside Bridge & Steel Co. v. Mountain States Constr. Co.*, 445 U.S. 907, 909-11 (1980) (White, J., dissenting from denial of certiorari) (noting conflicts among lower courts as to countability of contacts in interstate contractual transactions); Brilmayer, *supra* note 13, at 80-105.

77. See *World-Wide*, 444 U.S. at 312-13 (Brennan, J., dissenting).

78. See *Shaffer v. Heitner*, 433 U.S. 186, 211-12 (1977). The Court in *Shaffer* purportedly rejected the presence standard despite the contention that it reached clear jurisdictional results. It stated that mere clarity of result is not sufficient if the result does not reflect the balance of interests among the litigants: The cost of clarity is "too high." *Id.* at 211.

It has been contended that the Court adopted the defendant's contacts test to control overreaching by lower courts in effectuating their own state's interests through a balancing of interests approach. Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds its Reach: A Comment on World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 58 N.C.L. Rev. 407, 409 (1980) (*World-Wide* test "sufficiently clear and workable [so] that the states, despite their contrary self-interest, would effectively be bound by it or could easily be held to it"). If that was what the Court intended, there are several problems with the result it reached in *World-Wide*:

(1) It is unclear whether substantial control of state court jurisdiction was necessary. See Jay, "Minimum Contacts" as a Unified Theory of Personal Jurisdiction: A Reappraisal, 59 N.C.L. Rev. 429, 457-59 (1981) (demonstrating the self-restraint of lower courts in the period between *Hanson* and *Shaffer*).

(2) The limiting rule of *World-Wide* and *Shaffer* is neither clearly stated nor easily applicable. See *Calder v. Jones*, 52 U.S.L.W. 4349, 4351 (U.S. Mar. 20, 1984) (first

In his admirable search for consistency in jurisdictional determinations, Professor Casad does not suggest that predictability be attained at the cost of practicality or convenience. It can be hoped that Professor Casad's thorough and insightful analysis will spur the courts to attain predictability by rejecting the formalistic and unnecessarily limiting requirements of sovereignty and purposeful contacts.

II. THE CONTINUING EMPHASIS ON PHYSICAL PRESENCE

A. *Are Physical Contacts Still Required?*

The presence doctrine of *Pennoyer* is a logical extension of a system based on the yin/yang of physical power and territorial limitation. Logic, however, does not guarantee a rational system of forum allocation, especially when the "logic" of presence is built upon formalistic theories that do not address the modern, practical problems of convenience in litigation.

The problems of adjusting the theoretical presence doctrine to the real-life, post-*Pennoyer* world of corporate defendants and interstate commercial activity have been well-documented.⁷⁹ In response to these problems, *International Shoe* adopted the minimum contacts

amendment concerns not allowed in jurisdictional analysis because "the infusion of such considerations would needlessly complicate an *already imprecise inquiry*" (emphasis added); *Kulko v. Superior Court*, 436 U.S. 84, 92 (1977) (in defendant's contacts test, "[t]he greys are dominant and even among them the shades are innumerable") (quoting *Estin v. Estin*, 334 U.S. 541, 545 (1948)). See *supra* note 76.

(3) Application of a limiting rule, solely for the purpose of limitation, makes no sense unless it can be grounded in some constitutionally protectible interest. See *LaFave*, *supra* note 75, at 325-26. Defendant's constitutional interest in avoiding the burdens of distant litigation, however, is sufficiently protected by a test that requires purposeful contacts only if defendant is suffering meaningful inconvenience.

(4) The court may have been concerned not only with overreaching assertions of jurisdiction, but also with overreaching applications of forum law. See *Louis*, *supra*, at 431. But see *Keeton*, 52 U.S.L.W. at 4348 (statute of limitations is choice of law question divorced from jurisdictional inquiry). Such concerns, however, can be addressed in a principled manner only through direct constitutional controls on choice of law. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 315-17 (1981). Depriving a forum of an opportunity to hear the case by imposing a strict minimum contacts test will indeed deprive the forum of an opportunity to apply its law. This indirect approach to control of forum law, however, has problematic side-effects: Application of the defendant's contacts test will often result in situations in which a court that has an unexceptionable interest in applying forum law nonetheless will be unable to hear the case. See *Shaffer v. Heitner*, 433 U.S. 186, 213-15 (1977); *Hanson v. Denckla*, 357 U.S. 235, 254 (1958). This problem of "deprived fora" would not arise if the Court allowed the forum to assert jurisdiction on a balance of interests approach. See *Silberman*, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. Rev. 33, 85-89 (1978).

79. See *Hazard*, *supra* note 17, at 272-81. See generally *Kurland*, *The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts*, 25 U. Chi. L. Rev. 569 (1958).

test as an alternative to physical presence.⁸⁰ It thus became possible to argue that a defendant's in-state activity did not necessarily have to be of the physical, bodily variety to count as a "contact" toward the "minimum." Long-arm statutes were enacted that provided for jurisdiction even without a physical act in the state by either defendant or his agents.⁸¹ Professor Casad's conclusion that physical presence of the defendant in the state is no longer an absolute constitutional or statutory requirement⁸² is theoretically beyond dispute.

Yet, as Professor Casad indicates throughout his book, reliance on physical presence has never truly been discarded by the courts. Until the 1983 term, the Supreme Court had upheld jurisdiction in only two cases in which there was no physical in-state activity by the defendant or his agents.⁸³ The expansive analysis employed by the Court in these two cases had, at the very least, been downplayed in later decisions.⁸⁴ In *Shaffer*, for example, the Court found that individual director-shareholders of a Delaware corporation did not have sufficient contacts with Delaware. In reaching this conclusion, the Court refused to consider the obvious non-physical nexus between defendants and the forum state.⁸⁵ Further, the Court supported its holding with the ominous assertion that the defendants never "set foot" in Delaware.⁸⁶ *Shaffer* indicated that while physical activity in the state may not be absolutely required for a finding of minimum contacts, it certainly would be a very important factor.

Professor Casad demonstrates that the Supreme Court's apparent fascination with physical contacts in *Shaffer* has been shared by the lower courts. In fraud cases, for example, lower courts regularly exercise jurisdiction if the defendant makes an oral representation

80. 326 U.S. at 316. "[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* (emphasis in original) (citations omitted).

81. *E.g.*, Cal. Civ. Proc. Code § 410.10 (West 1973); Ill. Ann. Stat. ch. 110, § 2-209(a)(2), (4) (Smith-Hurd 1983); N.Y. Civ. Prac. Law § 302(a)(3) (McKinney 1972).

82. R. Casad, *supra* note 3, ¶ 2.05, at 2-64.

83. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957); *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 648 (1950).

84. *See Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Hanson v. Denckla*, 357 U.S. 235 (1958).

85. The most notable connection was the acceptance of a directorship in a Delaware corporation. The Court held, curiously, that this obvious "contact" would not be countable unless the Delaware Legislature had made it so through enactment of a consent statute. 433 U.S. at 216. The Delaware Legislature shortly thereafter enacted such a statute, Del. Code Ann. tit. 10, § 3114 (1982), thereby exalting form over substance at the direction of the Supreme Court. *See Armstrong v. Pomerance*, 423 A.2d 174, 175 (Del. 1980).

86. 433 U.S. at 213.

while physically present in the state.⁸⁷ In contrast, courts are divided when the same representation is transmitted into the state by mail, telephone, or other means.⁸⁸ The traditional importance of physical presence at least partly accounts for this difference in results.

Physical presence also has been important to the lower courts in defamation cases. A court has been far more likely to assert jurisdiction if the defendant's physical contacts with the state gave rise to the defamation.⁸⁹ Similarly, physical presence, especially for negotiation or execution, frequently has been relied upon by lower courts in contract cases.⁹⁰ Yet if the same negotiations occur by mail or telephone, the jurisdictional result is far less predictable, even if the contract is to be substantially performed in the forum state.⁹¹

Professor Casad seeks to explain this *Pennoyer*-like adherence to the concept of physical presence by quoting from the oft-cited case of *In-Flight Devices Corp. v. Van Dusen Air, Inc.*:⁹²

The presence or absence of the defendant . . . are relevant to jurisdictional questions—not because of any antiquated idea that physical presence is . . . imposed by the limits of state sovereignty. They are relevant because they provide a clue to the significance attached by the defendant to the activities occurring within the forum state—and thus as clue to his expectations.⁹³

Unfortunately, Professor Casad's penetrating analysis of the long-arm cases does not bear out the assertion in *Van Dusen* that physical presence is only considered relevant in terms of a defendant's "expectations." More typically, a court has required physical presence almost

87. R. Casad, *supra* note 3, ¶ 7.06[1][a], at 7-55; see *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 902 (2d Cir. 1981).

88. See R. Casad, *supra* note 3, ¶ 7.06[2], [3], at 7-57 to -59. Compare *Kramer v. Vogl*, 17 N.Y.2d 27, 32, 215 N.E.2d 159, 162, 267 N.Y.S.2d 900, 904 (1966) (written misrepresentation sent into forum; jurisdiction denied) with *Francis I. duPont & Co. v. Chelednick*, 69 Misc. 2d 362, 330 N.Y.S.2d 149 (1971) (written representation sent into forum; jurisdiction upheld).

89. Compare *Brooks v. Magnaverde Corp.*, 619 P.2d 1271, 1273 (Okla. Ct. App. 1980) (jurisdiction asserted over defendant who published defamation while physically present in the state) with *Tavoulareas v. Comnas*, 720 F.2d 192, 194 (D.C. Cir. 1983) (defamation transmitted by interstate telephone call; jurisdiction denied under District of Columbia long-arm statute because court did not "wish to delve into a magical mystery tour of 'projecting presences'").

90. R. Casad, *supra* note 3, ¶ 8.01[2][a][i], at 8-4 to -6; see *Mallory Eng'g, Inc. v. Ted R. Brown & Assocs., Inc.*, 618 P.2d 1004, 1008-09 (Utah), *appeal dismissed*, 449 U.S. 1029 (1980).

91. See *Lakeside Bridge & Steel Co. v. Mountain States Constr. Co.*, 445 U.S. 907, 909-11 (1980) (White, J., dissenting from denial of certiorari); *Barnstone v. Congregation Am Echad*, 574 F.2d 286, 289 (5th Cir. 1978).

92. 466 F.2d 220 (6th Cir. 1972).

93. *Id.* at 235, *quoted in* R. Casad, *supra* note 3, ¶ 8.01[2][b], at 8-13.

for its own sake, as a necessary conceptual basis for jurisdiction.⁹⁴ This is clearly shown in cases in which the court refuses to assert jurisdiction even though the "expectations"⁹⁵ of the defendant are evident through a variety of factors other than physical presence.⁹⁶

It is of course true that physical contacts are relevant to determining whether a defendant has subjected himself to jurisdiction under the current defendant's contacts approach.⁹⁷ It does not follow, however, that the absence of physical contacts is crucial to the defendant's so-called expectations. When the Court in *Pennoyer* attached mystical qualities to physical presence, it could not have envisioned that significant in-state effects could occur by picking up a telephone 1,000 miles away from the forum state.

The minimum contacts test was designed to cover those modern developments to which the *Pennoyer* doctrine was ill-suited.⁹⁸ Even under the current strict view of minimum contacts, a telephone contact is just as controllable and purposeful as a contact based upon actual physical presence; the telephone contact does not result from the "unilateral activity" of another party.⁹⁹ Such a contact gives just as strong a clue to a defendant's "expectations" as does actual physical presence in the state. Of course, a defendant does not go to as much trouble in effectuating such a contact; picking up a phone is easier than getting on an airplane. Yet when the in-state effects are equivalent, and the actions are equally controllable and purposeful, there is

94. See *Tavoulareas v. Comnas*, 720 F.2d 192, 194 (D.C. Cir. 1983).

95. A jurisdictional system based on defendant's "expectations" is circular and question-begging. A defendant's expectations are based on what the law of jurisdiction tells him to expect. An absurd result is reached if the law that governs expectations is in turn based on what the defendant is entitled to expect. See *World-Wide*, 444 U.S. at 311 n.18 (Brennan, J., dissenting). The Supreme Court, however, continues to adhere to the expectations analysis. See *Keeton*, 52 U.S.L.W. at 4348 (defendant "must reasonably anticipate being haled into court [in the forum]") (citations omitted); *Calder v. Jones*, 52 U.S.L.W. 4349, 4351 (U.S. Mar. 20, 1984) (same).

96. See *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 597 F.2d 596, 603-04 (7th Cir. 1979) (contract performed substantially in forum state), *cert. denied*, 445 U.S. 907 (1980); *Rainbow Indus. Prods. v. Haybuster Mfg., Inc.*, 419 F. Supp. 543, 546 (E.D.N.Y. 1976) (numerous negotiations by mail and phone with plaintiff in forum state; delivery of goods f.o.b. accepted in forum state).

97. See *supra* notes 27-33 and accompanying text.

98. See *State ex. rel. White Lumber Sales, Inc. v. Sulmonetti*, 252 Or. 121, 126-27, 448 P.2d 571, 573-74 (1968); *Kurland*, *supra* note 79, at 573.

99. See *World-Wide*, 444 U.S. at 298. The Court in *World-Wide* held that in order for contacts to be countable against the defendant, they must be controllable by the defendant. This controllability test is designed to allow defendants to adjust their primary conduct to prevent amenability in forums not of their choice. According to the Court, the contact in *World-Wide* could not be controlled by the defendants, and thus could not be counted against them. *Id.* at 297-99.

no logical or practical basis for distinguishing between a phone call and an in-state visit. The fact that it is now easier for defendants to engage in in-state activity should hardly protect them from amenability. Quite the contrary: a modern jurisdictional system must adapt to advances in communication and technology by providing for amenability upon the use of such advances by defendants.¹⁰⁰ It is inappropriate to give special emphasis to physical contacts and to ignore non-physical contacts in a modern jurisdictional analysis, whether that emphasis derives from a restrictive view of "expectations" or from a simple throwback to the presence mystique of *Pennoyer*.¹⁰¹

The Supreme Court's recent decision in *Calder v. Jones*¹⁰² is therefore a welcome sign. The plaintiff in *Calder* sued the National Enquirer and two individual employees in her home state of California for a libel distributed extensively in the forum.¹⁰³ The individual defendants, the writer and editor of the allegedly libelous article, argued that they had no minimum contacts with California because they had never left their desks in Florida while writing and preparing the article.¹⁰⁴

100. See *Parke-Bernet Galleries v. Franklyn*, 26 N.Y.2d 13, 17-18, 256 N.E.2d 506, 508-09, 308 N.Y.S.2d 337, 340-41 (1970) (telephone call is sufficient when effects are equivalent to presence in state). For cases in which courts have not adapted to technological change, see *R. Casad, supra* note 3, ¶ 4.02[1][a][ii], at 4-22 to -23 & n.76 (discussing cases in which non-physical contacts held insufficient for jurisdiction).

101. As Professor Casad notes, the long-arm statutes of some states have been held to require physical in-state activity for some causes of action. See *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc. (Feathers v. McLucas)*, 15 N.Y.2d 443, 464, 209 N.E.2d 68, 80, 261 N.Y.S.2d 8, 24 (tortious act outside state that causes harm within state not covered by long-arm statute), *cert. denied*, 382 U.S. 905 (1965). The New York State Legislature amended N.Y. Civ. Prac. Law § 302 after *Feathers* to provide for jurisdiction over tortious acts that cause harm within the state, even without in-state physical activity by the defendant, if other specified criteria are met. See 1966 N.Y. Laws 725.

To the extent that physical contacts still are required under state law, the legislature, or the court construing the statutory grant, has failed to adapt the state process to modern commercial activity. This is a disservice to resident plaintiffs forced to sue in distant states despite defendant's controllable effects in plaintiff's state. This outmoded result was rejected as a matter of statutory construction by the Illinois Supreme Court in *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 436-37, 176 N.E.2d 761, 763 (1961). Most state courts construe long-arm statutes quite expansively. *R. Casad, supra* note 3, ¶ 4.01[1][b], at 4-5.

102. 52 U.S.L.W. 4349 (U.S. Mar. 20, 1984).

103. Plaintiff's husband also sued defendants, but filed a voluntary dismissal of his complaint. *Id.* at 4350 n.1.

104. It should be noted that acceptance of the defendants' argument in *Calder* would allow reporters to avoid in-state amenability for libel claims because they failed to do physical in-state research: The less diligent the reporter, the less likely it would be that he could be sued in the state for libel.

The Court, in a unanimous decision authored by Justice Rehnquist, went out of its way to uphold jurisdiction despite the absence of physical in-state contacts.¹⁰⁵ The Court concluded: "An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California."¹⁰⁶

The Court in *Calder* appropriately concluded that physical contacts were unnecessary when defendants created significant in-state effects through non-physical contacts. The crucial issue is that the defendants purposefully created contacts that harmed the defendants in the state. The fact that the contacts were non-physical is unimportant. *Calder* correctly rejects physical presence as an unnecessary conceptual limitation on "effects" jurisdiction.

Calder's ultimate effect upon the Court's consistent fascination with physical contacts is difficult to assess at this point. There will be many cases, however, in which the defendant has purposefully created in-state effects through non-physical contacts. If, for example, defendant purposefully calls plaintiff in the forum state to place an order, or to make a misrepresentation, *Calder* is clear authority for permitting jurisdiction.¹⁰⁷ At the very least, *Calder* should be a signal to lower courts to give more emphasis to non-physical contacts than they have in the past.

Beyond *Calder*, further progress can be made toward abandoning the mystique of presence by a clear rejection of the sovereignty theory of due process. While the sovereignty theory does not depend on physical presence for its continued vitality, the fact is that sovereignty

105. For example, the parties disputed whether the reporter had visited California to research the article. The Court found it unnecessary to rely on this alleged physical in-state activity. *Id.* at 4350 nn.4, 6.

106. *Id.* at 4351. The Court also held that first amendment concerns are never relevant to the jurisdictional inquiry. The Court reasoned that any potential chilling effect on activity protected by the first amendment was adequately addressed under the substantive law of libel. *Id.* at 4351. On this point the Court rejected the requirement of "greater contacts" in first amendment cases, established in *New York Times Co. v. Connor*, 365 F.2d 567, 572-73 (5th Cir. 1966).

107. *Calder* will continue the familiar limitations on jurisdiction based upon "mere foreseeability" established in *World-Wide*, 444 U.S. at 295. The Court in *Calder* hypothesized a welder who works on a boiler that ultimately explodes in the forum state. Jurisdiction over the welder is inappropriate because defendant did not purposefully create an in-state effect through out-of-state conduct. The hypothetical welder should be distinguished from the buyer or seller who purposefully calls a party in the forum state in order to do business. See *State ex rel. White Lumber Co. v. Sulmonetti*, 252 Or. 121, 126-27, 448 P.2d 571, 573-74 (1968) ("On the strength of a telephoned offer . . . mills in Oregon were told to fabricate a special order of plywood It is clear that the placing of the telephoned order had effects, or 'significant contacts,' in Oregon.").

and presence were entwined in *Pennoyer*. The repudiation of one conceptual demon left by *Pennoyer* undoubtedly would undermine the companion concept. At least it would cause courts to question the necessity of physical contacts with more scrutiny than in previous cases.

B. *Are Physical Contacts Still Sufficient?*

Any continuing emphasis on physical contacts is problematic because it downplays the relevance of out-of-state activity that purposefully creates an in-state effect. But that is not the only problem. Adherence to the presence mystique has also led courts to hold that physical in-state contact is not only necessary, but also *sufficient* for assertion of jurisdiction. This unfortunate doctrine has plagued the courts for over 100 years.

The notion that physical presence in the state will itself support jurisdiction stems, of course, from *Pennoyer*.¹⁰⁸ While *International Shoe* expanded upon *Pennoyer*'s presence analysis, it did not question the presumed validity of jurisdiction based solely on presence.¹⁰⁹

In *Shaffer*, the Court rejected the notion that the mere presence of defendant's property in the state was sufficient for assertion of quasi in rem jurisdiction. *Shaffer* is inconclusive, however, regarding the general validity of jurisdiction based solely on physical presence in the state. The property attached by the plaintiff in *Shaffer* was not physically present in the forum state.¹¹⁰ Thus, *Shaffer*'s broad attack on the presence doctrine is dictum and has no direct effect on the assertion of jurisdiction on the basis of physical presence. The concurring opinions in *Shaffer* emphasized that actual physical location of property within the state could be a sufficient basis of jurisdiction, even quasi in rem jurisdiction.¹¹¹ The Court did state broadly that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe*."¹¹² This statement, however, is ambiguous, because *International Shoe* merely supplemented and did not

108. See *supra* note 17 and accompanying text. The Supreme Court has never directly held that physical presence was sufficient in and of itself for jurisdiction. See Ehrenzweig, *supra* note 19, at 309-12. The long-standing "rule" of transient jurisdiction ironically is based on dictum in *Pennoyer*.

109. See *Donald Manter Co. v. Davis*, 543 F.2d 419, 420 (1st Cir. 1976) (rejecting argument that transient jurisdiction is prohibited; *International Shoe* concerned "with expanding jurisdiction beyond traditional limits, not with contracting it").

110. The properties attached were intangible obligations of a Delaware corporation. A Delaware statute, Del. Code Ann. tit. 8, § 169 (1983), created a fictional in-state situs for such intangibles that was at odds with the rules of location adopted by every other state.

111. 433 U.S. at 217-19 (Powell & Stevens, JJ., concurring).

112. *Id.* at 212.

supplant the emphasis on physical presence in *Pennoyer*.¹¹³ Finally, when the Court applied the minimum contacts test to the facts in *Shaffer*, it stressed that the defendants had no physical contacts with Delaware.¹¹⁴ In sum, *Shaffer* is at best unclear as to whether actual physical contact with the forum state is sufficient for jurisdictional purposes.

It is therefore not surprising that plaintiffs continue to argue that defendant's physical in-state activity is in itself sufficient for jurisdiction. This argument is made in three situations: (1) when there is a general lack of contact between defendant and the forum state, but defendant has property physically located in the state which is unrelated to the cause of action (quasi in rem); (2) when the only contact between defendant and the forum state is his temporary presence within the borders at the time of service (transient jurisdiction); and (3) when defendant's only contact with the forum state is through relatively insignificant physical activity therein, such as the mere execution of a contract to be performed by both parties in a different state (minimal physical contacts).

In each of these situations, any rational system of forum allocation based upon the relative convenience of the litigants and the efficiency of the judicial system would preclude jurisdiction. In each case, the defendant's physical contact with the forum state is not determinative of the issues to be pursued at trial, and is not pertinent to whether the balance of inconvenience between plaintiff and defendant has been resolved equitably. Physical contacts, though relevant, cannot fairly be held sufficient to subject the defendant to jurisdiction. Yet Professor Casad has unearthed lower court decisions upholding jurisdiction over the defendant in each situation.¹¹⁵ These decisions are not based on grounds of fairness and convenience in litigation. Rather, they are symptomatic of the continued obsession with the concept of physical contacts promulgated by *Pennoyer*.

113. The Court in *International Shoe* stated that a minimum contacts analysis would be necessary only if defendant were not present in the forum. 326 U.S. at 316.

114. 433 U.S. at 213.

115. (1) Quasi in rem: *Feder v. Turkish Airlines*, 441 F. Supp. 1273, 1278 (S.D.N.Y. 1977).

(2) Transient jurisdiction: *Aluminal Indus. v. Newtown Commercial Assocs.*, 89 F.R.D. 326, 329 (S.D.N.Y. 1980); *Humphrey v. Langford*, 246 Ga. 732, 734-35, 273 S.E.2d 22, 24 (1980). Professor Casad suggests that the continued vitality of transient jurisdiction can be explained on the ground that a resident plaintiff is bringing the suit. R. Casad, *supra* note 3, ¶ 2.04[2][c], at 2-50. In *Aluminal*, however, the suit was brought by a non-resident plaintiff. More importantly, if the minimum contacts test truly applies to all assertions of state court jurisdiction, transient jurisdiction should be unconstitutional without regard to the plaintiff's interest. The Supreme Court has instructed that a threshold of defendant's contacts must always be met. Mere presence of the defendant cannot satisfy that threshold. See *Shaffer*, 433 U.S. at 209.

The Supreme Court's recent decision in *Calder* did not address the question whether physical presence in the state is sufficient to support jurisdiction; the issue in *Calder* was the individual defendants' lack of physical in-state contacts.¹¹⁶ *Calder's* de-emphasis of physical contacts nonetheless may have an effect on a lower court's consideration of whether physical presence is enough for jurisdiction. If the Supreme Court has downplayed physical contacts when they do not exist, there is little reason to give special consideration to physical contacts when they do exist. It can be hoped that the Court's limited rejection of the presence mystique in *Calder* will lead to the total abandonment of the conceptual limitation of physical presence.

If our system of forum allocation is to be truly based on fairness and convenience among the parties, the courts must reject both aspects of the presence doctrine. It is not fair to plaintiffs to require physical contacts between the defendant and the state, nor to defendants to hold that physical contacts are sufficient. Professor Casad's in-depth investigation of long-arm jurisdiction brings the dual unfairness of the presence concept sharply into focus.

CONCLUSION

Professor Casad brings some coherence to the disarray of long-arm adjudication. More importantly, his comprehensive analysis of the problems in the current state of the law may spur efforts toward continuing improvement and modernization. These efforts must result in the rejection of the formalisms of sovereignty and physical presence. In the words of Professor Hazard, it is most important that we "release *Pennoyer's* grip on our minds."¹¹⁷ For anyone who thought we had already done so,¹¹⁸ I refer you to Professor Casad's book.

(3) Minimal physical contacts: *M.L. Byers, Inc. v. HRG Prods., Inc.*, 492 F. Supp. 827, 830 (S.D.N.Y. 1980) (contract negotiations and performance principally outside forum state; jurisdiction asserted on basis of brief visit by defendant to forum state); *Carlson Corp. v. University of Vt.*, 380 Mass. 102, 104, 402 N.E.2d 483, 485 (1980) (physical act of signing contract in forum state was only basis of jurisdiction).

116. See *supra* notes 102-07 and accompanying text.

117. Hazard, *supra* note 17, at 288.

118. The rash of commentary following *Shaffer* was generally to the effect that the *Pennoyer* concepts were no longer valid. Jay, *supra* note 78, at 429; see, e.g., Nordenberg, *supra* note 24, at 587, 592; Silberman, *supra* note 78, 34-36; *The Supreme Court*, 1976 Term, 91 Harv. L. Rev. 69, 158-59 (1977). After *World-Wide*, however, commentators were no longer so certain. See, e.g., Ratner, *Procedural Due Process and Jurisdiction to Adjudicate: (a) Effective-Litigation Values vs. The Territorial Imperative; (b) the Uniform Child Custody Jurisdiction Act*, 75 Nw. U.L. Rev. 363, 368-74 (1980); Ripple & Murphy, *World-Wide Volkswagen Corp. v. Woodson: Reflections on the Road Ahead*, 56 Notre Dame Law. 65, 74 (1980); *The Supreme Court*, 1979 Term, 94 Harv. L. Rev. 75, 116 (1980).

